



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 21, 2004

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2004-8994

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211339.

The Texas Department of Transportation (the "department") received a request for proposals submitted by two firms in response to a Request for Detailed Proposals to develop, design, and construct the SH 45 SE turnpike project through a comprehensive development agreement, which the department issued on May 25, 2004. You claim that the information at issue is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. In addition, you have notified the firms at issue, J.D. Abrams, L.P./Hill Country Constructors and Zachry Construction Corporation of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information made confidential by other statutes. We understand you to assert that the submitted information is confidential under section 361.3023 of the Transportation Code.² Section 361.3023 provides:

(a) To encourage private entities to submit proposals under Section 361.3022, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Section 361.3022(b)(1) and (2);

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement; and

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

(b) After the department completes its final ranking of proposals under Section 361.3022(h), the final rankings of each proposal under each of the published criteria are not confidential.

Transp. Code § 361.3023. Section 361.3022(b)(1) and (2) state:

(b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

(1) information regarding the proposed project location, scope, and limits; [and]

² We note you submitted responsive documents marked as a representative sample with your original submission to this office on August 17, 2004, and you subsequently submitted additional responsive documents with your submission of September 14, 2004. Based on your representations in your submission of August 17, we understand you to assert section 361.3023 for all of the submitted information, and we address your claimed exceptions accordingly.

(2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project[.]

Transp. Code § 361.3022(b)(1), (2). Section 361.302 of the Transportation Code defines a "comprehensive development agreement" as "an agreement that, at a minimum, provides for the design and construction of a turnpike project and may also provide for the financing, acquisition, maintenance, or operation of a turnpike project." Transp. Code § 361.302. In this instance, you indicate that the information at issue relates to proposals regarding a comprehensive development agreement. Further, you inform us that a contract has not yet been awarded for the turnpike project. Based on your representations and our review of the submitted information, we determine that, to the extent the submitted information does not come within subsections 361.3022(b)(1) and (2), it is confidential under section 361.3023 of the Transportation Code and must be withheld under section 552.101 of the Government Code.

To the extent the submitted information comes within subsections 361.3022(b)(1) and (2), of the Transportation Code, it is not confidential and may not be withheld under section 552.101. We will, however, consider the department's claim under section 552.104 of the Government Code with respect to such information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive situations, typically in the context of competitive bidding. *See* Open Records Decision No. 592 (1991). A governmental body seeking to withhold information from disclosure pursuant to section 552.104 must demonstrate some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 generally does not except bidding information after competitive bidding has concluded and a contract has been executed. *See* Open Records Decision No. 541 (1990).

As noted above, you inform us that the information at issue relates to a request for proposals for which a contract has not yet been awarded. Based on your representations and our review of the submitted information, we find that the department has demonstrated that release of the information would harm the interests of the department in a particular competitive situation. We therefore conclude that, to the extent the submitted information is not confidential under section 361.3023 of the Transportation Code, it is excepted from disclosure pursuant to section 552.104 of the Government Code and may be withheld at this time.

In summary, we determine that to the extent the submitted information does not come within subsections 361.3022(b)(1) and (2) of the Transportation Code, it is confidential under section 361.3023 of the Transportation Code and must be withheld under section 552.101 of the Government Code. To the extent the submitted information does come within

subsections 361.3022(b)(1) and (2), we conclude that such information is excepted from disclosure under section 552.104 of the Government Code and may be withheld. As we are able to make these determinations, we do not reach arguments submitted by Zachry Construction Corporation.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within ten calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within ten calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/krl

Ref: ID# 211339

Enc: Submitted documents

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